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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RAUL CARRETO-VASQUEZ, Defendant and Appellant.	A121994 (San Mateo County Super. Ct. No. 064147)

Raul Carreto-Vasquez appeals from a judgment entered after a jury convicted him on one count of first degree burglary (Pen. Code[1], §§ 459, 460, subd. (a)), one count of committing a lewd or lascivious act on a child under the age of 14 (§ 288, subd. (a)), and one count of oral copulation with a child under the age of 10 (§ 288.7, subd. (b)). He contends (1) the trial court erred when it admitted evidence that he had engaged in similar sexual misconduct against a different child victim, (2) the court erred when it denied his motion for a mistrial, (3) the court instructed the jury incorrectly, (4) cumulative error mandates a reversal of his conviction, and (5) the sentence imposed was cruel and unusual punishment. We will reject these arguments and affirm.

[1] Unless otherwise indicated, all further section references will be to the Penal Code.

I. FACTUAL AND PROCEDURAL BACKGROUND

Eight-year-old Jane Doe, her four-year-old sister E., and their mother S.[2] lived in one bedroom of a two-bedroom apartment in Redwood City. A man named Joel lived in the other bedroom of the apartment. S.'s sister G. and appellant, her common-law husband, stayed in the living room. A woman named Maria and her husband lived in the garage. Because of the tight living conditions, those occupying the apartment had a rule that tenants were not allowed to go into each other's room. The only exception was the living room where G. and appellant lived. That was considered to be a common area.

On May 29, 2007, Jane came home from school as usual around 3:00 p.m. No one was home except Maria, who lived in the garage. Jane did her homework until appellant came home with E. While E. played on the living room floor, appellant and Jane played several games of hangman.

After playing for a while, appellant said he wanted to play an adult game. Appellant got a glove from the kitchen and two bandanas from G.'s underwear drawer. He used one of the bandanas to cover Jane's eyes and the other to bind her hands. Appellant then put his thumb in the glove and put it in Jane's mouth. Appellant removed his thumb from Jane's mouth and told her it was her turn.

Appellant covered his own eyes with a bandana and told Jane to put something in his mouth. Jane found a cotton ball under a pillow and put it in appellant's mouth.

Appellant said it was his turn again. He bound Jane's hands and covered her eyes. Appellant then pushed Jane into her bedroom and closed the door. Jane sat on the edge of the bed. Appellant unzipped his pants and went to get a towel. As he did, Jane peeked through the bandana that covered her eyes. She saw appellant had a glove on top of his penis. Appellant told Jane to "open up." When she did, appellant pushed her head

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[2] Many of the witnesses share the same last names. To provide clarity and to protect the identity of the child victim, we will refer to the parties by their first names.

toward his penis and told her to "chew on this." Appellant told Jane he would be inside her mouth for 10 seconds. In fact it was 20 seconds. At that point Jane told appellant to stop. He did. Appellant left Jane's bedroom.

Jane untied the bandana that bound her hands and went to the living room where E. was playing. Jane took E. and went to her uncle's apartment who lived in the same complex. She borrowed her uncle's phone and called her mother telling her she did not want to live in that apartment anymore.

When S. returned, Jane told her what had happened. S. took Jane to the police station.

Jane spoke to an officer about what had happened. She was nervous and she lied at first when describing what appellant had done. She told the officer that she had been sleeping when appellant came into her room. Jane was afraid she would get in trouble if she admitted she had been playing hangman with appellant just before the assault.

Based on these facts an information was filed charging appellant with the three offenses we have described. As is relevant here, the information also alleged appellant committed the sex offenses during a burglary, (§ 667.61, subd. (d)(4),) and that appellant had bound and tied his victim (§ 667.61, subd. (e)(6).)

The case proceeded to a jury trial where the prosecution presented the evidence we have set forth above. The prosecution buttressed its case with testimony from a nurse who examined Jane after the assault. She testified that Jane had an abrasion on the inside of her lower lip and another abrasion on the roof of her mouth that was surrounded by blood spots. The location and nature of the injuries Jane exhibited were consistent with an object being forcefully thrust into her mouth.

The prosecution also presented evidence that a mixture of appellant's and Jane's DNA was found on the bandana that appellant used in his "game."

Finally, the prosecution presented testimony from a young woman, Rosairo V., who lived with appellant and G. at one point. Rosario said that when she was 13 years old, appellant grabbed her and tried to kiss her on several occasions.

Appellant testified in his own defense. He admitted he played a game with Jane that involved two handkerchiefs and gloves and covering their eyes. However appellant denied engaging in any sexual activity with Jane.

The jurors considering this evidence convicted appellant on all three counts and found the enhancements to be true. Subsequently, the court sentenced appellant to a term of 25 years to life in prison.

This appeal followed.

II. DISCUSSION

A. Prior Sexual Offenses

The prosecution filed a motion that asked that it be allowed to present evidence that appellant had committed sexual offenses against other minor victims. The court conducted a hearing on the motion. One of the alleged victims, Rosario V., testified. She said appellant had grabbed her in a sexual way. After hearing this evidence, the court ruled Rosario could testify at trial.

Rosario did testify. She said she and her mother lived in an apartment in Florida with appellant and G.. One day when Rosario was thirteen, she was sitting in her room when appellant walked in and locked the door. He grabbed Rosario around the waist and tried to kiss her repeatedly. Rosario resisted and appellant stopped when they heard someone coming.

A few weeks later it happened again. As Rosario was watching television, appellant came up behind her, covered her eyes with his hands, and tried to kiss her. Rosario was able to push her chair away and leave.

The hugging and attempted kissing continued and happened a total of nine or ten times. One time, appellant appeared to be sexually excited when he hugged Rosario. The last time appellant hugged Rosario, her mother saw what was happening.

Rosario's mother Salustia also testified at trial. She confirmed that she saw appellant hugging Rosario. Salustia called out Rosario's name and appellant stopped. Salustia reprimanded Rosario telling her not to get involved with appellant. The situation was resolved when Salustia and Rosario moved to another apartment.

Appellant now contends the trial court erred when it ruled admissible the evidence concerning his prior acts against Rosario.

Evidence of prior criminal conduct generally is inadmissible to show a defendant has a propensity or disposition to commit criminal acts. (Evid. Code, § 1101, subd. (a).) However, the Legislature created an exception to the general rule where the prior acts involve sexual offenses. (Evid. Code, § 1108.) By its express language, Evidence Code section 1108 requires the court to engage in the weighing process under Evidence Code section 352 before admitting propensity evidence. (§ 1108, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 917.) In this weighing process, the court must consider factors such as relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of distracting or inflaming the jury. (*Ibid.*) On appeal, we review a challenge to admission of prior sexual acts under Evidence Code sections 1108 and 352 for abuse of discretion and will reverse only if the trial court's ruling was " 'arbitrary, whimsical, or capricious as a matter of law. [Citation.]' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

The relevant factors here clearly supported the trial court's decision to admit the evidence of the prior acts that were committed against Rosario.

The evidence was certainly relevant. Appellant denied committing any sexual acts against Jane. The fact that appellant committed sexual acts against a different child victim strongly supported the conclusion that appellant committed the crimes charged.

The acts were similar in that both instances, appellant used a position of trust to commit sexual acts against a young girl with whom he lived. There was strong evidence that the acts against Rosario did occur. They were supported by the testimony of Rosario *and* her mother who provided independent corroboration. The acts against Rosario were not remote. The first hugging incident occurred in October 2006, less than a year before the acts against Jane. There was little chance of distracting or inflaming the jury. Although the acts against Rosario clearly were improper, they were considerably less serious than the charged crime and were committed against a victim who was older than Jane. Based on this record, we conclude the trial court did not abuse its discretion when it ruled admissible the acts committed against Rosario.

Appellant contends the evidence concerning Rosario was likely to distract the jurors from their main inquiry because it was presented "toward the end of the prosecution's case" and the instructions concerning the prior bad acts "came at the very end of the substantive instructions". Appellant has not cited any case that holds these considerations to be relevant and we decline to be the first. Indeed, it is equally plausible to conclude the evidence and instructions concerning the acts against Rosario were *less* distracting because they came at the conclusion of a 15-day trial and near the end of the instructions when the jurors presumably were more fatigued. Furthermore, the court effectively told the jurors they should weigh all the evidence equally regardless of when it was presented when it instructed them that they must not "make up [their] mind[s] about the verdict or any issue until after [they had] discussed the case with the other juror[s] during deliberations . . . ." On appeal we presume the jurors followed this admonition. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) We conclude the factors appellant had identified are not determinative.

Next, appellant contends the trial court abused its discretion because the jurors learned appellant had not been prosecuted for the offenses against Rosario. He notes that one reason for not admitting evidence of prior bad acts is the risk that a "jury might

punish the defendant for his uncharged crimes . . . ." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42.) While that is indeed a risk, that risk was lessened by the fact that the offenses against Rosario were not particularly inflammatory and were less serious than the charged offense. Furthermore, that risk was "counterbalanced" by instructions on reasonable doubt and the need to prove each of the elements of the charged crimes. (*Ibid.*) The asserted prejudicial impact was also not determinative.

Finally, appellant argues that the admission of evidence concerning his prior acts against Rosario violated his due process rights. Our Supreme Court has ruled that the admission of evidence under Evidence Code section 1108 does not violate a defendant's right to due process. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 913-922.) We are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) The primary case on which appellant relies, *McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, does not change that conclusion. That case dealt with the improper admission of character evidence that did not qualify as a sexual offense. As our Supreme Court has noted, because *McKinney* did not involve "section 1108 . . . nor even involve the admission of evidence of the defendant's other crimes, it is inapposite." (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 921-922.)

In sum, we conclude the trial court did not err when it ruled the evidence concerning the prior acts against Rosario admissible under Evidence Code section 1108.[3]

B. Mistrial Motion

As we have noted, Rosario's mother Salustia testified at trial and she confirmed that she saw appellant hugging her daughter. However, Salustia also tried to minimized the incident. She said she reprimanded *her daughter* for what had occurred and she asked for *appellant's* forgiveness while testifying.

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[3] Having reached this conclusion, we need not decide whether the evidence also would have been admissible under Evidence Code section 1101.

Faced with this attempt to minimize the acts committed against Rosario, the prosecutor elicited the following testimony:

"Q. You told Officer Reynolds, Detective Reynolds when he came to Florida that had you not intervened you believed he would have raped your daughter, isn't that true?

"A. Yes.

"Q. And you believed that when you said it?

"A. Yes.

"Q. And you still believe that today, don't you?

"A. Yes, I told Mr. Mike, I believe his name, anything, I said I want it to be a closed case now, I want to be in peace."

After Salustia concluded her testimony, the court excused the jurors and spoke with the prosecutor and defense counsel privately. The court said it was "troubled" by the testimony that had been "elicited from the last witness, the mother, that she thought had she not intervened her daughter would have been raped." The court questioned whether that testimony was proper under Evidence Code sections 1101 or 1108.

The prosecutor said she believed the testimony was proper in light of the fact that Salustia had tried to minimize the incident between Rosario and appellant. According to the prosecutor, after defense counsel got Salustia to minimize the incident, "I thought it was important for the jury to understand that this was a serious incident."

The court was unconvinced by the prosecutor's explanation. The court said that as a result of the prosecutor's questioning, "the jury's got the idea that because the mother said at some earlier point in time that she thought that had she not intervened her daughter would [have] been raped. I view that as prejudicial and fundamentally unfair . . . ."

Defense counsel said he did not object to the question and response because he "didn't want to draw any more attention to it than there was tactically." Counsel then moved for a mistrial.

The trial court denied the mistrial motion, ruling that it "[did not] think that the evidence or comment rises to the level of depriving the defendant of a fair trial." However, the court said it would admonish the jurors.

When the jurors returned to the courtroom, the court stated as follows:

"The last witness, Salustia . . . , and her testimony that was at the last part of her testimony where she expressed an opinion about what [would] have occurred had she not intervened is speculative. I'm ordering that testimony stricken from the record. It is not to be considered by the jury for any purpose. Okay. So thank you very much."

Appellant now contends the trial court erred when it denied his motion for a new trial.

A mistrial should be granted if the court is apprised of prejudice that it determines to be incurable by admonition or instruction. (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn.22.) The trial court is vested with the discretion to determine whether a particular incident is incurably prejudicial and its ruling will be reversed on appeal only where the trial court abused its discretion. (*Ibid.*)

Here, the testimony in question was brief, and as the trial court noted, was speculative in nature. The relatively noninflamatory character of the testimony is highlighted by defense counsel's immediate reaction; for tactical reasons he chose not to object. The trial court then cured any possible potential for prejudice by promptly telling the jurors that they were to disregard the testimony and not consider it for any purpose. On appeal, we must presume the jury followed that directive. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

We conclude the trial court did not abuse its discretion when it denied appellant's motion for a new trial.

C. Burglary Instruction

The trial court asked the prosecutor to explain her burglary theory. She said it was that the "victim was taken into the room in the residence with the specific felonious intent to sexually assault her there." To support this theory, the prosecutor asked the court to instruct the jurors as follows:

"Defendant may not be convicted of burglarizing his own home so long as he has an unconditional possessory right of entry to the area allegedly burglarized; defendant may be convicted of burglarizing an area of his own home to which he has no right of entry."

The trial court declined to give the instruction the prosecutor had prepared. Instead, the court instructed with a modified version of the standard burglary instructions.

Appellant now contends the trial court should have given the instruction the prosecutor prepared. Appellant concedes a defendant can be convicted of burglary for entering a room in a house to which he has no right of entry. However, citing evidence in the record that could be interpreted to indicate appellant had consent to enter Jane's bedroom under certain circumstances, appellant argues the court should have instructed the jurors that they could convict him of burglary only if they concluded he did not have a right to enter Jane's bedroom.

We reject this argument because it is premised on the assumption that a burglary has not occurred if a person enters a building (or in this case a room in a building) with consent. That is not correct.

As a general rule, a person may not be convicted of burglarizing his own home. (*People v. Gauze* (1975) 15 Cal.3d 709, 714.) However, a person may be convicted of burglary even if he enters with consent, provided that he does not have an unconditional possessory right to enter. (*People v. Pendleton* (1979) 25 Cal.3d 371, 382.) Here, there is no evidence that appellant had an unconditional possessory right to enter Jane's bedroom. At most, the evidence appellant cites (that Jane's mother asked appellant to

help him gather dirty laundry in her bedroom, and told him he could go in there if the girls needed anything) indicates appellant had a *conditional* right to enter the bedroom for specific purposes. Since the premise for appellant's argument is flawed, it follows that the court did not err when it failed to instruct as he suggests.

The primary case upon which appellant relies, *People v. Gauze, supra,* 15 Cal.3d 709, does not require a contrary conclusion. As our Supreme Court explained in a subsequent case: "The defendant in *Gauze* was convicted of burglary predicated upon his entry into his own apartment with intent to assault his roommate. The question presented was whether the defendant could be guilty of burglarizing his own home. We answered this question in the negative on the ground that one has an unconditional right to enter his own home, even for a felonious purpose. We did not overrule existing authority upholding burglary convictions in which there was consensual entry. The law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter." (*People v. Pendleton, supra,* 25 Cal.3d at p. 382.)

D. Cumulative Error

Appellant contends that even if the individual effect of the errors he has alleged was not prejudicial, cumulatively they mandate a reversal of his conviction. We have concluded the trial court did not commit any errors. There is no error to cumulate.

E. Cruel and Unusual Punishment

The trial court sentenced appellant to 25 years to life in prison. Appellant now contends his sentence must be reversed because it constituted cruel and unusual punishment.

Appellant never raised this issue in the court below. He has forfeited the right to raise it on appeal. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) We also reject the argument on its merits.

A sentence violates the Eighth Amendment of the United States Constitution if it is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) However, the protection afforded by the Eighth Amendment is narrow. It applies only in the "'exceedingly rare'" and "'extreme'" case. (*Ewing v. California* (2003) 538 U.S. 11, 21 (plur. opn. of O'Connor, J.).) We are not convinced this is such a case. The 25-year-to-life sentence imposed is noteworthy and will undoubtedly result in appellant spending a significant portion of his life in prison. However, appellant's crime is also noteworthy. He took advantage of a position of trust to sexually assault an eight-year-old girl. The nature of the offense, beginning as it did with a childhood game of hangman, advanced to what appellant characterized as an "adult game" that involved blindfolds and binding, and then culminated with appellant forcing his bound and blindfolded victim to "chew on" his penis, suggested significant planning. The fact that appellant apparently committed similar offenses against a different minor with whom he lived indicated the offense against Jane was not isolated and that appellant was a danger to society. Appellant's depraved sexual conduct against some of the most vulnerable members of our society fully supports the lengthy sentence that was imposed. We conclude this is not the "exceedingly rare" and "extreme" case that violates the federal Constitution.

Appellant argues his sentence does violate the federal Constitution because he will not be eligible for parole until he is almost 60 years old. He urges this court to follow a concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600-602, where Justice Mosk stated that a sentence of 111 years was cruel and unusual punishment because it was impossible for a human being to serve. We note respectfully that Justice Mosk's opinion was not joined by any other member of the Supreme Court. It has no precedential value. (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.) Furthermore case law holds that a sentence is not unconstitutional even if it exceeds a defendant's life expectancy. (*Ibid.*) If a sentence that exceeds a defendant's life expectancy is not

unconstitutional, then a lengthy sentence that does not exceed a defendant's life expectancy is also not necessarily unconstitutional.

Turning to California law, a sentence violates the California Constitution if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) "The main technique of analysis under California law is to consider the nature both of the offense and of the offender." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Here, as we have stated, the offenses at issue were extremely serious. Appellant sexually molested an eight-year-old girl in a way that demonstrated significant planning. As for appellant himself, he does not have any formal prior criminal history, but the testimony at trial demonstrated the current crime was not an isolated incident. Appellant's prior conduct together with the extremely serious nature of the crimes against Jane convince us that the 25-year-to-life sentence imposed does not shock the conscience or offend fundamental notions of human dignity. It does not constitute cruel and unusual punishment.

III. DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Needham, J.

Bruiniers, J.